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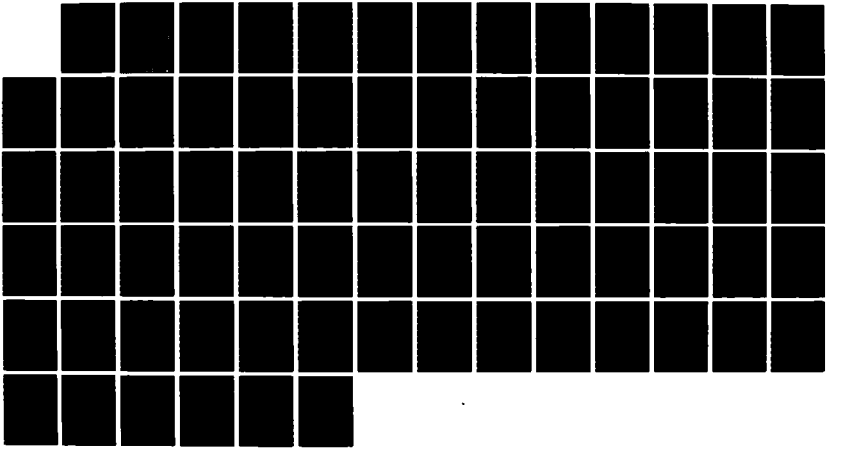

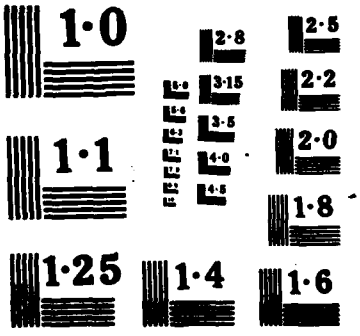
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| REPORT DOCUMENTATION PAGE | | READ INSTRUCTIONS BEFORE COMPLETING FORM |
|---|---|---|
| 1. REPORT NUMBER<br>AFIT/CI/NR 86-66T | 2. GOVT ACCESSION NO. | 3. RECIPIENT'S CATALOG NUMBER |
| 4. TITLE *(and Subtitle)*<br>Federal Rule of Evidence 412 and Military Rule of Evidence 412: Are They Serving Their Purpose? | | 5. TYPE OF REPORT & PERIOD COVERED<br>THESIS/DISSERTATION |
| | | 6. PERFORMING ORG. REPORT NUMBER |
| 7. AUTHOR(s)<br>Carol DiBattiste | | 8. CONTRACT OR GRANT NUMBER(s) |
| 9. PERFORMING ORGANIZATION NAME AND ADDRESS<br>AFIT STUDENT AT: Columbia University | | 10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS |
| 11. CONTROLLING OFFICE NAME AND ADDRESS<br>AFIT/NR<br>WPAFB OH 45433-6583 | | 12. REPORT DATE<br>1986 |
| | | 13. NUMBER OF PAGES<br>68 |
| 14. MONITORING AGENCY NAME & ADDRESS*(If different from Controlling Office)* | | 15. SECURITY CLASS. *(of this report)*<br>UNCLAS |
| | | 15a. DECLASSIFICATION/DOWNGRADING SCHEDULE |

16. DISTRIBUTION STATEMENT *(of this Report)*

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17. DISTRIBUTION STATEMENT *(of the abstract entered in Block 20, if different from Report)*

18. SUPPLEMENTARY NOTES

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# FEDERAL RULE OF EVIDENCE 412 AND MILITARY RULE OF EVIDENCE 412: ARE THEY SERVING THEIR PURPOSE?

Carol DiBattiste

"Submitted in partial fulfillment of the requirements for the degree of Master of Laws in the Faculty of Law, Columbia University."

# THESIS ABSTRACT

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7. Title: Federal Rule of Evidence 412 and Military Rule of Evidence 412: Are They Serving Their Purpose?

8. Number of Pages: 68

The purpose of the research paper is to examine and evaluate the present effectiveness of two evidentiary rules: The Privacy Protection for Rape Victims Act of 1978, more commonly known as Federal Rule of Evidence 412, and its military counterpart, Military Rule of Evidence 412. The Ninety-Fifty Congress of the United States enacted Federal Rule of Evidence 412 in October 1978 to protect rape victims during trial from the degrading and embarrassing disclosure of intimate details about their private sexual behavior. Military Rule of Evidence was adopted for military trial practice in 1980 for the same purpose. Both rules permits evidence of the victim's past sexual behavior when "constitutionally required to be admitted." The essay evaluates whether Federal Rule 412 and Military Rule 412 have been emasculated in light of the various interpretations by the federal and military courts of the "constitutionally required" provisions. After examination of the historical background, purpose, and scope of Federal Rule 412 and Military Rule 412, the essay analyzes federal and military rape cases in which the courts determined that evidence of the victims' past sexual behavior was constitutionally required to be admitted. The analysis leads to a final assessment that victims of rape or nonconsensual sexual offenses do not have any more assurance today than they had before the enactment of Federal Rule 412 and Military Rule 412 that their private sexual behavior will not unnecessarily be made public at trial.

## Bibliography

### Key Primary Sources:


1. Pub. L. No. 95-540, 92 Stat. 2046 (1978), Privacy Protection for Rape Victims Act of 1978, Federal Rule of Evidence 412.

2. Military Rule of Evidence 412, Manual for Courts-Martial, United States, 1984, part III-20.

3. 124 Cong. Rec. 34,912-13 (1978); 124 Cong. Rec. 36, 255-57 (1978).

4. Privacy of Rape Victims: Hearing on H.R. 14666 and Other Bills Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, 94th Cong., 2d Sess. (1976).

5. Analysis, Military Rule of Evidence 412, reprinted in Manual for Courts-Martial, United States, 1984, appendix 22.

6. Doe v. United States, 666 F.2d 43 (4th Cir. 1981).

7. United States v. Dorsey, 16 M.J. 1 (C.M.A. 1983); United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983).

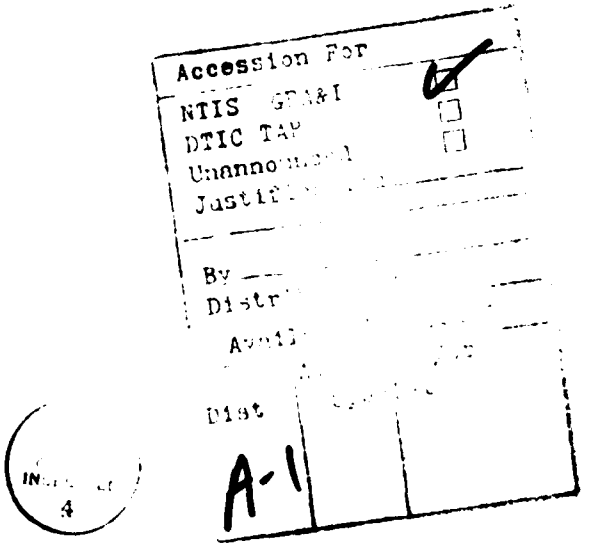

### Key Secondary Sources:


1. 23 C. Wright & K. Graham, Federal Practice & Procedure: Evidence sec. 5381-93 (1980 & Supp. 1985).

2. Saltzburg & Redden, Federal Rules of Evidence Manual (3d Edition 1982 & Supp. 1985).

3. Saltzburg, Schinasi & Schlueter, Military Rules of Evidence Manual (1981 & Supp. 1985).

4. D. Louisell & C. Mueller, Federal Evidence sec. 194-98 (Supp. 1983).

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## I. Introduction

Over seven years ago, the Ninety-Fifth Congress of the United States enacted the Privacy Protection for Rape Victims Act of 1978, Federal Rule of Evidence 412,[1] "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives"[2] during the course of a rape trial. In doing so, they followed the lead of many jurisdictions which had already enacted rape shield laws.[3] Not only did Congress seek to change the federal system's evidentiary rules, which permitted a wide ranging inquiry into the rape victim's sex life, but they also hoped to provide a model rule for jurisdictions without rape shield laws[4].

Military Rule of Evidence 412,[5] modeled after Federal

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[1]Pub. L. No. 95-540, 92 Stat. 2046 (1978). See Appendix A, infra, for text of Fed. R. Evid. 412.

[2]124 Cong. Rec. 34,912 (1978) (Remarks of Rep. Mann).

[3]See 124 Cong. Rec. 34,913 (1978) (Remarks of Rep. Holtzman). See also 1A J. Wigmore, Evidence section 62 (Tillers Rev. 1983 & Supp. 1985); Annot., Constitutionality of "Rape Shield" Statutes Restricting Use of Evidence of Victim's Sexual Experiences, 1 A.L.R. 4th 283 (1980 & Supp. 1985) [hereinafter cited as Annot.]; Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544, 550 n.23 (1980) [hereinafter cited as Tanford & Bocchino]; Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 32 n.196 (1977) [hereinafter cited as Berger].

[4]124 Cong. Rec. 34,913 (1978) (remarks of Rep. Holtzmann). Hawaii, Iowa, and the military have enacted rape shield statutes modeled after Federal Rule 412. 23 C. Wright & K. Graham, Federal Practice & Procedure: Evidence sec. 5381 (1980 & Supp. 1985) [hereinafter cited as Wright & Graham].

[5]Military Rule of Evidence 412, Manual for Courts-Martial, United States, 1984, part III-20. See Appendix B, infra, for text of Mil. R. Evid. 412.

Rule 412[6], was adopted for military practice in 1980.[7] Its purpose is basically identical to that of its federal counterpart: "to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses."[8]

To effectuate their purposes, both Federal Rule 412 and Military Rule 412 have identical provisions which restrict the admissibility of evidence concerning the victim's sexual behavior except in three restricted situations.[9] One of the exceptions permits evidence of the victim's other sexual behavior when "constitutionally required to be admitted."[10] Both Congress and the military drafters intended the "constitutionally rquired" provision as a savings clause in the event of a challenge based on the right to confront witnesses.[11]

Whether the restrictive provisions of Federal Rule 412 and its military counterpart unduly infringe upon the

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[6]Analysis, Military Rule of Evidence 412, reprinted in Manual for Courts-Martial, United States, 1984, appendix 22 [hereinafter cited as Analysis].
[7]See infra p. 16 & notes 52-54 and accompanying text.
[8]Analysis, supra note 6.
[9]Fed. R. Evid. 412(b), Appendix A, infra; Mil. R. Evid. 412(b), Appendix B, infra.
[10]Fed. R. Evid. 412(b)(1), Appendix A, infra; Mil. R. Evid. 412(b)(1), Appendix B, infra.
[11]See 124 Cong. Rec. 34,912 (1978) (Remarks of Rep. Mann); Saltzburg and Redden, Federal Rules of Evidence Manual 224 (3d edition 1982) [hereinafter cited as Saltzburg and Redden]; Analysis, supra note 6; Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual 207 (1981) [hereinafter cited as Saltzburg, Schinasi and Schlueter].

accused's sixth amendment right to confrontation and compulsory process[12] continues to generate much discussion and controversy among commentators.[13] The United States Supreme Court has yet to address the question directly,[14] however, almost without exception, state rape shield statutes have survived sixth amendment challenges in state and federal courts.[15] Due in part to the absence of a Supreme Court ruling on the relevance of a rape victim's sexual conduct and in part to the lack of specificity in the federal and military

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[12]"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor..." U.S. Const. amend. VI.

[13]See generally Rose & Chapman, The Military's Rape Shield Rule: An Emerging Roadmap, February 1984 Army Lawyer 29 (1984) [hereinafter cited as Rose & Chapman] ; Gilligan & Lederer, The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation, 101 Military Law Rev. 1 (1983) [hereinafter cited as Gilligan & Lederer]; Gale, Military Rule of Evidence 412: The Paper Shield, 14 Advoc. 146 (1982) [hereinafter cited as Gale]; Comments,Federal Rule of Evidence 412: Was the Change An Improvement?, 49 U. of Cinn. Law Rev. 244 (1980) [hereinafter cited as Comments]; Tanford & Bocchino, supra note 3; Rothstein,Evidence Workshop, New Federal Evidence Rule 412 on Sex Victim's Character, 15 Crim. Law Bull. 353 (1979) [hereinafter cited as Rothstein]; Berger, supra note 3.

[14]The Supreme Court has declined every opportunity to review state rape shield statutes. People v. Requena, 105 Ill. App. 3d 831, 435 N.E.2d 125 (1982), cert. denied, 459 U.S. 1204 (1983); State v. Brown, 636 S.W.2d 929 (Mo. 1982), cert.denied, 459 U.S. 1212 (1983); Pratt v. Parratt, 615 F.2d 486 (8th Cir. 1980), cert. denied, 449 U.S. 852 (1980); People v. Mandel, 403 N.Y.S.2d 63 (1978), rev'd on other grounds, 425 N.Y.S.2d. 63, 401 N.E.2d 185 (1979), cert. denied, 446 U.S. 949 (1980); State v. Cosden, 18 Wash. App. 213, 568 P.2d 802 (1977), cert. denied, 439 U.S. 823 (1978); State v. Hill, 309 Minn. 206, 244 N.W.2d 728 (1976), cert. denied, 429 U.S. 1065 (1976).

[15]See generally cases cited in Annot., supra note 3, at 287, 292-301; Wright & Graham, supra note 4, at sec. 5387, at 571 n.53; Comments, supra note 13, at 249 n.31.

rape shield laws regarding when evidence of the victim's sexual history is constitutionally required to be admitted, the "constitutionally required" provision lends itself to various interpretations.

How do the federal and military courts interpret the "constitutionally required" provision? What sexual history evidence is being admitted and why? Ultimately, is the purpose of the rules being eroded? This article evaluates the present effectiveness of Federal Rule 412 and Military Rule 412 in light of the federal and military courts' interpretations of the "constitutionally required" provision. After examination of the historical background, purpose, and scope of Federal Rule 412 and Military Rule 412, followed by a look at the "constitutionally required" exception, the article focuses on an analysis of the reasoning given by the courts in determining what evidence is "constitutionally required" to be admitted. The analysis leads to a final assessment of the present value of Federal Rule 412 and Military Rule 412 as laws designed to protect rape and/or sexual assault victims who testify at trial from a degrading inquisition about their sexual behavior.

## II. Historical Background and Purpose

### A. Federal Rule of Evidence 412

Congress began action to protect rape victims as witnesses in 1975 by introducing at least two pieces of legislation.[16] In 1976, Representative Elizabeth Holtzman (New York), joined by other members of the House of Representatives, introduced eight rape shield bills[17] and the Subcommittee on Criminal Justice of the House Judiciary Committee held hearings on the various bills.[18] Notwithstanding, the 94th Congress failed to enact any rape shield legislation.

During the first session of the 95th Congress in 1977, House and Senate members again introduced several rape victim bills[19]. But it was not until the final days of the 95th Congress that an amended version of one of the

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[16]S. 1, 94th Cong., 1st Sess. (1975); S. 1244, 94th Cong., 2d Sess. (1975).

[17]H.R. 11980, 94th Cong., 2d Sess. (1976); H.R. 12684, 94th Cong., 2d Sess. (1976); H.R. 12685, 94th Cong., 2d Sess. (1976); H.R. 12968, 94th Cong., 2d Sess. (1976); H.R. 13481, 94th Cong., 2d Sess. (1976); H.R. 14666, 94th Cong., 2d Sess. (1976); H.R. 15379, 94th Cong., 2d Sess. (1976); H.R. 15470, 94th Cong., 2d Sess. (1976).

[18]Privacy of Rape Victims: Hearing on H.R. 14666 and Other Bills Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, 94th Cong., 2d Sess. (1976) [hereinafter cited as Hearings].

[19]S. 1100, 95th Cong., 1st Sess. (1977); S. 1422, 95th Cong., 1st Sess. (1977); S. 1437, 95th Cong., 1st Sess. (1977); H.R. 408, 95th Cong., 1st Sess. (1977), H.R. 4726, 95th Cong., 1st Sess. (1977); H.R. 4727, 95th Cong., 1st Sess. (1977); H.R. 4728, 95th Cong., 1st Sess. (1977); H.R. 4729, 95th Cong., 1st Sess. (1977).

bills[20] became Federal Rule 412. After minimal discussion on the floor of both chambers, the House of Representatives passed the bill by voice vote on October 10, 1978[21] and the Senate followed suit on October 12, 1978.[22] Federal Rule of Evidence 412 was signed into law on October 28, 1978, and became effective in trials commencing after November 28, 1978.[23]

By enacting Federal Rule 412, Congress repealed the common law rule that evidence of a rape victim's sexual history was admissible[24] during a rape trial. The common law rule epitomized a deeply engrained societal belief that information about the victim's prior sexual activities

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[20]H.R. 4727, 95th Cong., 1st Sess. (1977) was amended before it reached the floor of the House of Representatives for a vote. In addition to some changes in language, the scope of the rule was changed to limit it to criminal cases and the exception for constitutionally required evidence was added.

[21]124 Cong. Rec. 34,912-13 (1978).

[22]124 Cong. Rec. 36,255-57 (1978).

[23]14 Weekly Comp. Pres. Doc. 1902 (Oct. 30, 1978).

[24]During Congressional consideration of Rule 412, Representative Mann stated:

> "The present Federal Rules of Evidence reflect the traditional approach. Rule 404(a)(2) of the Federal Rules of Evidence permits the introduction of evidence of a 'pertinent character trait.' The advisory committee note to that rule cites, as an example of what the rule covers, the character of a rape victim when the issue is consent. Rule 405 of the Federal Rules of Evidence permits the use of opinion or reputation evidence or the use of evidence of specific behavior to show a character trait.
>
> Thus, Federal evidentiary rules permit a wide ranging inquiry into the private conduct of a rape victim, even though that conduct may have at best a tenuous connection to the offense for which the defendant is being tried.

124 Cong. Rec. 34,912 (1978) (remarks of Rep. Mann).

is relevant in determining the accused's guilt or innocence.[25] Underlying the belief was a fear of false charges brought by vindictive women.[26] The words of Sir Matthew Hale, Lord Chief Justice of the King's Bench from 1671 to 1676, that a claim of rape was "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent"[27] exemplified this fear. To protect innocent defendants against false rape charges, courts[28] admitted evidence of the rape victim's

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[25]See generally 1A J. Wigmore, Evidence sections 62, 62.1 (Tillers rev. 1983); Spector & Foster, Rule 412 and the Doe Case: The Fourth Circuit Turns Back the Clock, 35 Okla. L. Rev. 87, 88 n.4 (1982) [hereinafter cited as Spector & Foster]; Tanford & Bocchino, supra note 3 at 546-51; Berger, supra note 3, at 20-22.

[26]Berger, supra note 3, at 21.

[27]1 M. Hale, The History Of The Pleas Of The Crown 634 (1st American ed. Philadelphia 1847) (1st ed. London 1736).

[28]The federal courts were no exception. See United States v. Spoonhunter, 476 F.2d. 1050 (10th Cir. 1973), (exclusion of evidence of rape victim's single prior act of intercourse was proper because defense was alibi and not consent, however, would allow reputation and opinion evidence of victim's character); Packineau v. United United States, 202 F.2d. 681 (8th Cir. 1953) (exclusion of evidence of rape victim's prior acts of sexual intercourse with another was prejudicial error); Lovely v. United States, 175 F.2d 312 (4th Cir. 1949) (exclusion of evidence which amounted to only insinuations about rape victim's prior sexual misconduct was proper but defendant had the right to show previous sexual experiences of the prosecutrix and her general unchaste character for the purpose of attacking her credibility and to show probability of consent); Hicks v. Hiatt, 64 F.Supp 238 (M.D. Pa. 1946) (prejudicial error in court-martial proceedings on charge of rape where evidence which would have tended to prove reputation of complaining witness for lack of chastity was available but not offered by defense counsel). Gish v. Wisner, 288 F. 562 (5th Cir. 1923) (general reputation for chastity of the complaining witness was material as bearing upon the question of her consent and was admissible upon the measure of damages in civil damage action for assault with intent to commit rape).

character for unchastity. Acts of previous "immoral" sexual relations, considered to be acts of moral turpitude, were used to impeach the victim's credibility and to infer consent.[29]

The rape victim's character for lack of chastity was mainly proven by testimony about her reputation.[30] Opinion testimony and evidence of specific instances of conduct were methods permitted less frequently.[31] Jury instructions further reflected common law mentality.[32]

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[29]See 1A J. Wigmore, Evidence section 62 (Tillers Rev. 1983); Tanford & Bocchino, supra note 3, at 546-47; Berger, supra note 3, at 15-16 nn.95-99; Ordover, Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity, 63 Cornell L.Q. 90, 96-97, 120 n.175 (1977) [hereinafter cited as Ordover]. See also note 25 supra.

[30]See 1A J. Wigmore, Evidence section 62.1 (Tillers Rev. 1983); 7 J. Wigmore, Evidence section 1985 (1940).

[31]See 7 J. Wigmore, Evidence sections 1983, 1985 (1940); Tanford & Bocchino, supra note 3 at 548; Berger, supra note 3 at 16-17. But cf. 1A J. Wigmore, Evidence section 62.1 (Tillers Rev. 1983) (decisions of the 1940s and 1950s seemed to increasingly admit evidence of specific instances of the complainant's unchastity; recent codifications allow the use of opinion evidence for this purpose and some states allowed opinion evidence before any codification); See,e.g., Fed. R. Evid. 405(a): "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."

[32]E.g., D. Aaronson, Maryland Criminal Jury Instructions and Commentary section 4.32 (1975):

> Where the complaining witness and the defendant are the only witnesses, a charge of rape is one which, generally speaking, is easily made, and once made, difficult to disprove. Therefore, I charge you that the law requires that you examine the testimony of the prosecuting witness with caution.

Tanford & Bocchino, supra note 3, at 546-47. See also, e.g., California Jury Instructions Criminal No. 10.06 (rev. ed. 1970), set forth in Berger, supra note 3, at 15 n.96 and in Ordover, supra note 29, at 98 n.36.

The common law view prevailed until the 1970s.[33] Throughout the seventies, coinciding with a time of growing awareness of the equality of women and a change in public attitude toward conventional sexual behavior,[34] feminists, legal commentators and the media attacked rape evidence laws and the treatment of rape victims.[35] Many complained that evidence of a victim's prior sexual behavior is not relevant to the issues of consent or credibility.[36] A number of commentators argued that any evidence of prior sexual activity creates a substantial prejudicial effect; Evidence of a victim's prior extramarital, premarital or unconventional sexual activity distracts the jury to such a degree that the victim becomes the person on trial rather

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[33]See 1A J. Wigmore, Evidence section 62.1 (Tillers Rev. 1983).
[34]See generally 1A J. Wigmore, Evidence section 62.1 (Tillers Rev. 1983); Tanford & Bocchino, supra note 3, at 546 n.6; Berger, supra note 3, at 2-7; Ordover, supra note 29, at 99-102; N. Gager & C. Schurr, Sexual Assault: Confronting Rape in America (1976); S. Brownmiller, Against Our Will: Men, Women and Rape (1975) [hereinafter cited as Brownmiller].
[35]See extensive list of sources in Spector & Foster, supra note 25, at 88 n.4; Tanford & Bocchino, supra note 3, at 549 n.22; Berger, supra note 3, at 2 nn.3-6, 10 n.73. See also text accompanying note 34 supra.
[36]See text accompanying note 35 supra.

than the accused.[37] One commentator described the victim's plight in a common law rape trial: "The standard defense strategy for puncturing holes in a rape case was (and is) an attempt to destroy the credibility of the complaining witness by smearing her as mentally unbalanced, or as sexually frustrated, or as an over-sexed promiscuous whore."[38]

Feminists charged that not only was the rape victim open to a degrading interrogation about her prior sexual activities and reputation in her community while in the courtroom, but she was also frequently humiliated by examining

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[37]See, e.g., Feild, Rape Trials and Jurors' Decisions, 3 Law & Hum. Behav. 261 (1979); Ireland, Reform Rape Legislation: A New Standard of Sexual Responsibility, 49 U. Colo. L. Rev. 185 (1978); Berger, supra note 3, at 30-31; Harris, Towards a Consent Standard in The Law of Rape, 43 U. Chi. L. Rev. 613 (1976); Catton, Evidence Regarding the Prior Sexual Conduct of an Alleged Rape Victim-Its Effect on the Perceived Guilt of the Accused, 33 U. Toronto L. Rev. 165 (1975); Findlay, The Cultural Context of Rape, 60 Women L. J. 199 (1974) [hereinafter cited as Findlay]; H. Kalven & H. Zeisel, The American Jury 249-254 (1966) (study of trial process in 1950s showing that in 42 cases of simple rape, the jury acquitted the defendant in 37 cases). See also Nat'l Inst. L. Enf. & Crim. Just., Forcible Rape: A National Survey of the Response by Prosecutors (1977) (seventy-four percent of prosecutors surveyed felt that evidence of victim's prior sexual conduct had considerable impact on the jury). But see U.S. Dep't Just., Sourcebook of Criminal Justice Statistics 1984, at 574 (E. McGarrell & T. Flanagan eds.) [hereinafter cited as Sourcebook] (of 76 federal rape cases in fiscal year 1983, 13 cases resulted in dismissal and seven resulted in acquittal); Tanford & Bocchino, supra note 3, at 572-75 (available statistics do not support argument that sexual history evidence results in acquittals).

[38]Brownmiller, supra note 34, at 262.

doctors, police and society at large.[39] Others argued that the common law rule led to a reluctance of victims to report the crime, or, if they did report the crime, the rule led to a reluctance of the victim to cooperate in the prosecution of the accused.[40]

In response to this widespread criticism, many jurisdictions enacted rape shield legislation to eliminate automatic admissibility of evidence regarding a rape victim's prior sexual behavior.[41] Congress followed suit late in

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[39]Berger, supra note 3, at 22-24. As a result, rape crisis centers were established which aid victims by providing escort services, counseling and referrals to lawyers, psychiatrists and psychologists. Id. at 3. Victim compensation programs have also been enacted. See, e.g., J. Anderson & P. Woodard, Victim and Witness Assistance: New State Laws and the System's Response, 68 Judicature 221 (1985); Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

[40]See generally Spector & Foster, supra note 25, at 89 n.4; Hindelang & Davis, Forcible Rape in the United States: A Statistical Profile in Forcible Rape, (Chappell ed.) (1977); Berger, supra note 3, at 4-7, 24; Brownmiller, supra note 34, at 190; Findlay, supra note 37, at 205. Cf. Sourcebook, supra note 37, at 273-75, 574 (estimated percentages of rapes in U.S. not reported to police: 1979-48%, 1980-57%, 1981-42%, 1982-45%; in fiscal year 1983, 17% of rape cases tried in federal courts resulted in dismissal).

[41]See note 3 supra.

1978 and promulgated Federal Rule of Evidence 412.[42]

The purposes of Federal Rule 412 are threefold. First, and foremost, is "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives"[43] during federal rape trials. The second purpose, derivative of the first, is to encourage the reporting of rapes and to encourage cooperation in prosecuting the

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[42]See note 1 supra. See also Appendix A, infra, for text of Fed. R. Evid. 412. The paucity of rape cases prosecuted in the federal courts may account for the slow action by Congress in passing rape shield legislation. "Federal prosecutions of these crimes over which the United States has jurisdiction constitute only a tiny fraction of the nationwide incidence of rapes. ... [F]ederal prosecutions of the crime of rape ... over a three-year period, fiscal 1974 through 1976, involved a total of forty-two defendants." Hearings, supra note 18, at 3. But see Sourcebook, supra note 37 (in fiscal year 1983, 76 rape cases were tried in U.S. District Courts). Federal rape law extends to rapes committed within the special maritime and territorial jurisdiction of the United States or on an Indian reservation. 18 U.S.C. sections 2031-32 (1982); 18 U.S.C. section 1153 (1982).

[43]See note 2 supra.

defendant.[44] Although it is likely that Federal Rule 412 has some impact upon a victim's decision whether to testify,[45] it is arguable whether it plays a role in the reporting of rapes to the police.[46] Finally, Federal Rule 412 was

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[44]Arguments made during the Congressional debates indicate problems of underreporting and lack of cooperation with police and prosecutors were reasons for enacting Fed. R. 412:

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as a rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.

124 Cong. Rec. 34,913 (1978) (remarks of Rep. Holtzman).

> The unfortunate result of this practice has been that women are hesitant to cooperate with police and prosecutors in bringing such cases to trial. After suffering the trauma of rape, many victims are understandably reluctant to put themselves through another ordeal on the witness stand. The practice of subjecting rape victims to such interrogation has been clearly shown to act as a deterrent on effective law enforcement for the crime of rape.

124 Cong. Rec. 36,256 (1978) (remarks of Sen. Bayh).

[45]See sources cited in note 40 supra; Wright & Graham, supra note 4, sec. 5382, at 501-02.

[46]See Wright & Graham, supra note 4, at sec. 5382, at 497-501. The goal "to foster reporting" is based upon the factual contention that underreporting results from fear of admission of sexual conduct evidence at trial. Although the empirical data considered by Congress confirmed the contention that rape is an underreported crime, the data failed to show that fear of admission of prior sexual behavior evidence was a cause of the failure to report the crime. Moreover, data which Congress failed to consider tends to negate any relationship between knowledge of the rule of evidence and failure to report rapes. Id. at 497-501. Cf. Feild & Bienen, Jurors and Rape: A Study in Psychology and Law 179 (1980) (no evidence that enactment of rape reform statutes has had any effect on the reporting of rape). But see Berger, supra note 3, at 24 (factors such as fear of attacker and desire to avoid publicity may dissuade the victim from reporting but evidentiary rule is widely regarded as a prime deterrent); supra p. 11 & note 40.

to "serve as a model to suggest to remaining states that reform of existing rape laws in important to the equity of our criminal justice system."[47] The President emphasized these three purposes when he signed the Federal Rule 412 into law.[48]

In enacting Federal Rule 412, House and Senate representatives also wanted to insure that Federal Rule 412 did not infringe upon the accused's constitutional

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[47]Representative Holtzman's remarks represent this purpose:

> [O]ver 30 States have taken some action to limit the vulnerability of rape victims to such humiliating cross-examination of their past sexual experiences and intimate personal histories. In federal courts, however, it is permissible still to subject rape victims to brutal cross-examination about their past sexual histories. H.R. 4727 would rectify this problem in federal courts and I hope, also serve as a model to suggest to the remaining states that reform of existing rape laws is important to the equity of our criminal justice system.

124 Cong. Rec. 34,913 (1978) (remarks of Rep. Holtzman).

[48]President Carter stated: "This bill provides a model for State and local revision of criminal and case law. It is designed to end the public degradation of rape victims and, by protecting victims from humiliation, to encourage the reporting of rape." 14 Weekly Compilation of Presidential Documents 1902 (October 30, 1978).

rights.[49] Congress viewed the "constitutionally required" exception[50] as a means to protect the accused's constitutional rights; however, they envisioned few occasions when it would be necessary to admit evidence of the victim's sexual behavior under this exception.[51] Thus, it appears that they anticipated strict construction of the "constitutionally required" provision by the courts.

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[49]Relevant portions of statements in the House of Representatives and Senate:

> It does so by narrowly circumscribing when such evidence may be admitted. It does not do so, however, by sacrificing any constitutional right possessed by the defendant. The bill before us fairly balances the interests involved--the rape victim's interest in ...; the defendant's interest in being able adequately to present a defense by offering relevant and probative evidence; and society's interest in a fair trial, one where unduly prejudicial evidence is not permitted to becloud the issues before the jury.

124 Cong. Rec. 34,912 (1978) (remarks of Rep. Mann).

> First, in order to make sure that we are [not] infringing upon a defendant's civil liberties, such evidence may be admissible where it is required under the constitution. This exception is intended to cover those instances where, because of an unusual set of circumstances, if the general rule of inadmissibility were to be followed, it might deprive a defendant of his constitutional rights.

124 Cong. Rec. 36,256 (1978) (remarks of Sen. Bayh). "[I]t is important that we keep in mind the constitutional rights of the defendant to a fair trial. Therefore this bill has been carefully drafted to keep the reform within constitutional limits." Cong. Rec. 36,256 (1978) (remarks of Sen. Biden).

[50]Fed. R. Evid. 412(b)(1). See Appendix A, infra.

[51]During the floor debate, Representative Holtzman commented on the intended scope of Fed. R. Evid. 412(b)(1): "The first circumstance is where the Constitution requires that the evidence be admitted. This exception is intended to cover those infrequent instances where, because of an unusual chain of circumstances, the general rule of inadmissibility, if followed, would result in denying the defendant a constitutional right. Cong. Rec. 34,913 (1978) (remarks of Rep. Holtzman). See also note 49 supra.

B. Military Rule of Evidence 412

On March 12, 1980, the President of the United States prescribed new evidentiary rules for military practice.[52] The Military Rules of Evidence were taken in large part from the Federal Rules of Evidence and modified to meet the necessities of a world-wide criminal practice.[53] Military Rule 412 was among the new Military Rules of Evidence promulgated in 1980.[54] Military Rule 412's purposes are identical to its federal counterpart, except that there is no indication that Military Rule 412 was intended to

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[52]Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980) (effective date of September 1, 1980). Exec. Order No. 12,198 amended the Manual for Courts-Martial, United States, 1969 (Revised ed.) Exec. Order 12,473, 49 Fed. Reg. 17,152 (1984) rescinded the Manual for Courts-Martial, United States, 1969 (Revised ed.) and prescribed the Manual for Courts-Martial, United States, 1984 (the Military Rules of Evidence are part III, Manual for Courts-Martial, United States, 1984).
The Military Rules of Evidence were the product of a two year effort participated in by the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation. The Rules were drafted by the Evidence Working Group of the Joint Service Committee on Military Justice. After review, modification and approval by the Joint Service Committee on Military Justice, the Rules were approved by the General Counsel of the Department of Defense and forwarded to the President via the Office of Management and Budget which circulated the Rules to the Departments of Justice and Transportation. Analysis, Military Rules of Evidence, reprinted in Manual for Courts-Martial, United States, 1984, appendix 22.
[53]Saltzburg, Schinasi, & Schlueter, supra note 11, at 1.
[54]See text accompanying notes 5 & 52 supra.

serve as a model statute for the states to follow.[55]

Prior to the promulgation of Military Rule 412, military practice followed the common law approach which allowed any evidence tending to show the unchaste character of the alleged victim, regardless of whether he or she had testified.[56] In a typical case, the victim underwent extensive cross-examination concerning her sexual behavior.[57] One commentator noted: "Trying the victim' was permitted, if not encouraged .... It allowed defense counsel to present opinion and reputation evidence dealing with every facet of the victim's past sexual behavior, from associations to specific instances of illicit sexual intercourse."[58]

Critics of the military practice claimed that it produced

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[55]The only statement of purpose appears in the Drafters' Analysis as follows:

> Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In doing so, it recognizes that the present rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults.

Analysis, supra note 6. The drafters of Military Rule 412 did not indicate whether they considered any empirical data to support these contentions. Id.

[56]Manual for Courts-Martial, United States, 1969 (Revised ed.) para. 153b(2)(b) (amended 1980 & rescinded 1984).

[57]See, e.g., United States v. Lewis, 6 M.J. 581 (A.C.M.R. 1978) (defense counsel permitted to cross-examine rape victim about 15 previous acts of sexual intercourse during the preceding six months with a boyfriend and about her use of birth control pills).

[58]Saltzburg, Schinasi and Schlueter, supra note 11, at 205.

irrelevant evidence and misled the triers of fact.[59] In drafting a rule which responded to these claims by restricting defense evidence concerning the victim's unchaste character, the drafters of Military Rule 412 intended to change existing military practice significantly.[60]

## III. Scope

Although it is substantively similar to Federal Rule 412, Military Rule 412 is broader in its application[61] and much less stringent in its procedural requirements.

Federal Rule 412 restricts the admissibility of evidence relating to the victim's sexual behavior in rape or assault with intent to commit rape cases; however, Military Rule of Evidence 412 applies to all "nonconsensual sexual offenses."[62] The scope of Military Rule 412 was expanded to include nonconsensual sexual offenses in an effort to deter such offenses in a unique military environment where men

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[59] See Saltzburg, Schinasi and Schlueter, supra note 11, at 205.

[60] Analysis, supra note 6.

[61] Each armed force has court-martial jurisdiction over all persons subject to the Uniform Code of Military Justice. 10 U.S.C. sec. 817 (1982). For a definition of persons subject to the Uniform Code of Military Justice, see 10 U.S.C. sec. 802 (1982). The Uniform Code of Military Justice applies in all places. 10 U.S.C. sec. 805 (1982). Courts-martial have power to try any offense under the Uniform Code of Military Justice. 10 U.S.C. sec. 818-20 (1982). The major constitutional limitation on the subject-matter jurisdiction of courts-martial was established by the Supreme Court in O'Callahan v. Parker, 395 U.S. 258 (1969) (offense under the code may not be tried by courts-martial unless it is service-connected). Cf. supra note 42 (federal rape jurisdiction is limited to special maritime and territorial jurisdiction of U.S. and Indian reservations).

[62] See Appendix B, infra. Mil. R. Evid. 412(e).

and women live and work in close quarters which are often very isolated.[63] "There is thus no justification for limiting the scope of the Rule, intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses, only to rape and/or assault with intent to commit rape."[64] Broadening Military Rule 412 to include all nonconsensual sexual offenses was a successful attempt by the drafters to cure defects contained in Federal Rule 412.[65] Despite the unique military reasons for expanding the scope of Military Rule 412, it is both illogical and unfair for Federal Rule 412 to prohibit evidence of a rape victim's sexual history yet allow irrelevant evidence concerning the sexual behavior of a victim who was forcibly sodomized.

Procedurally, Federal Rule 412 requires that at least fifteen days before the trial is scheduled to begin, the accused must file with the court and serve on the victim and all other parties, a written motion, accompanied by a written offer of proof which delineates evidence of the victim's prior sexual behavior.[66] Upon a determination that the offer of proof contains evidence described in one of the three exceptions, the judge must order an in-chambers

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[63]Analysis, supra note 6.
[64]Id.
[65]Saltzburg, Schinasi and Schlueter, supra note 11, at 206. The commentators agree with the military drafters that no justification exists to limit Mil. R. 412's application to only designated offenses.
[66]Fed. R. Evid. 412(c)(1)(2), Appendix A, infra.

hearing to determine the admissibility of the evidence.[67] If the court determines on the basis of the hearing that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice, the evidence may be admitted at trial, pursuant to a court order specifying exactly what evidence is admissible.[68] Contrary to the general admissibility standard stated in Federal Rule 403,[69] subdivision (c)(3) of Federal Rule 412 embodies a clear bias toward inadmissibility of past sexual conduct evidence by mandating exclusion where the potential for unfair prejudice is equal to or outweighs probative value. Therefore, in making his determination, the trial judge should be bound by Federal Rule 412's basic purposes.

Although subdivision (c)(3) of Military Rule 412 is identical to its federal counterpart,[70] other procedural requirements of Military Rule 412 are notably different and may contravene Military Rule 412's purposes. First, the drafters deleted the fifteen day notice and written

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[67]Fed. R. Evid. 412(c)(2), Appendix A, infra.

[68]Fed. R. Evid. 412(c)(3), Appendix A, infra. Subdivision (c)(3) qualifies at least the exceptions contained in subdivision (b)(2). The way subdivision (b)(1) is worded suggests that balancing standard of subdivision (c)(3) does not apply to "constitutionally required" evidence. D. Louisell & C. Mueller, Federal Evidence sec. 198[B], at 270 (Supp. 1983) [hereinafter cited as Louisell & Mueller]; Spector & Foster, supra note 25, at 103-04; Saltzburg, Schinasi, & Schlueter, supra note 11, at 208.

[69]Fed. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, ...."

[70]See Mil. R. Evid. 412(c)(3), Appendix B, infra; Fed. R. Evid. 412(c)(3), Appendix A, infra.

motion requirements contained in Federal Rule 412, reasoning that the requirements were impracticable because of the military's stringent speedy trial requirements.[71] Instead, Military Rule 412 requires that the defense counsel serve oral or written notice, accompanied by an offer of proof, on the military judge and the prosecutor (notice to the victim is not required).[72] No time standards are prescribed.[73] Thus, if defense counsel decide to utilize the rule to their tactical advantage and wait until the eve of trial to serve notice upon the prosecutor and the judge, the rule's purposes will be undermined. Up to that point, the victim was proceeding under the belief that she would not be questioned about her past sexual behavior. Now, realizing that she may be cross-examined about her sexual history, she will most likely experience greater anxiety about testifying and she may refuse to testify.

More problematic is the language "the military judge shall conduct a hearing, which may be closed [to spectators], to determine if such evidence is admissible."[74] Although the drafters were careful to note that the propriety of holding a hearing without spectators is dependent upon

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[71]Analysis, supra note 6.
[72]Mil. R. Evid. 412(c)(1)(2), Appendix B, infra.
[73]Id.
[74]Mil R. Evid. 412(c)(2), Appendix B, infra.

its constitutionality and the facts of each case,[75] a hearing open to the public will undoubtedly diminish Military Rule 412's purpose of protecting the privacy of the victim from unwarranted public intrusion in cases where the court determines that the sexual history evidence is inadmissible. One commentator noted: "Obviously, the purpose of [Federal] Rule 412 will be largely defeated if the hearing is public, and this fact may serve to distinguish it from more ordinary pretrial hearings where the defense seeks to obtain rulings excluding evidence, to which the right to a public trial does attach."[76]

Military Rule 412 presents yet a third procedural problem. Does it apply to Article 32 Investigations? Article 32 Investigations are pretrial proceedings which are analogous

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[75]Analysis, supra note 6. The question of the constitutional right of the accused and the public to an open hearing in this context has yet to be definitely resolved, however, most of the commentary supports exclusion. See generally Wright & Graham, supra note 4, sec. 5391, at 621-24; Louisell & Mueller, supra note 68, sec. 199, at 276-80; Rothstein, supra note 13, at 355-57.

[76]Louisell & Mueller, supra note 68, at 276.

to preliminary hearings[77] The drafters suggest: "although Rule 412 it is not per se applicable to ... Article 32 ... hearings,[78] it may be applicable via Military Rule of Evidence 303."[79] In order to fulfill the drafters'

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[77]Article 32 provides that a thorough and impartial investigation must be conducted before any charge may be referred to a general court-martial. The investigation includes an inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice. During the investigation, the accused has the right to be represented by counsel and has the right to cross-examine witnesses and present evidence on his own behalf. Uniform Code of Military Justice art. 32, 10 U.S.C. sec. 832 (1982). During the 1976 Congressional hearings on rape shield legislation, the Subcommittee considered the testimony of Sergeant Deborah Lieberman, United States Marine Corps, concerning her testimony as a rape victim during an Article 32 hearing. She told the SubCommittee about the degrading and humiliating manner in which she was cross-examined about her sexual history and testified that she felt as though she was raped mentally during the hearing. Hearings, supra note 18, at 55-61.

[78]Analysis, supra note 6. Mil. R. Evid. 1101(d) provides in pertinent part: "These [Military Rules of Evidence] rules (other than with respect to privileges) do not apply in investigative hearings pursuant to Article 32; ...."

[79]Analysis, supra note 6. Mil. R. Evid. 303 provides: "No person may be compelled to make a statememt or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person." The drafters' analysis of Mil. R. Evid. 303 provides:

> Rule 303 is therefore the means by which the substance of Rule 412 applies to Article 32 proceedings, and no person may be compelled to answer a question that would be prohibited by Rule 412. ... It should also be noted that it would clearly be unreasonable to suggest that Congress in protecting the victims of sexual offenses from the degrading and irrelevant cross-examination formerly typical of sexual cases would have intended to permit identical examination at a military preliminary hearing ...."

Analysis to Military Rule of Evidence 303, reprinted in Manual for Courts-Martial, United States, 1984, app. 22.

intentions, foster the policy of Military Rule 412 and insure consistency throughout military practice, both Military Rule 412 and Military Rule 1101[80] should be amended to make Military Rule 412 applicable to Article 32 hearings.[81]

Substantively, except for Military Rule 412's broader application, the key provisions of Federal Rule 412 and Military Rule 412 are identical. Both rules exclude from evidence all reputation and opinion testimony concerning the victim's past sexual conduct, notwithstanding any other provision of law.[82] The absolute bar to opinion and reputation evidence creates potential problems because in certain factual situations, opinion and reputation evidence regarding the victim's past sexual behavior is relevant and necessary

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[80]See note 78 supra.

[81]See Wood, Applying MRE 412: Should it be Used at Article 32 Hearings?, July 1982 Army Lawyer 13 (suggests several theories fostering application of Mil. R. Evid. 412 to Article 32 Hearings).

[82]Fed. R. Evid. 412(a), Appendix A, infra. Mil. R. Evid. 412(a), Appendix B, infra. No explanation of the meaning of the "notwithstanding" clauses appears in the legislative history of Fed. R. 412 or the drafters' analysis of Mil. R. 412. The clauses apparently mandate that no other provision of the Federal and Military Rules of Evidence shall supersede these subdivisions. This means that the conflicting provisions of Military and Federal Rules 404 and 405 are inapplicable to those matters included within the scope of Military and Federal Rule 412.

"[T]he result of the careless drafting of this provision will be to increase rather than restrict the power of judges ... the clause confers on judges the power, by interpretation, to decide for themselves the scope of the rule." Wright & Graham, supra note 4, sec. 5383, at 535.

to the accused's defense.[83] Even the "constitutionally required" provisions contained in both rules do not address reputation or opinion evidence but pertain only to evidence of specific instances of conduct;[84] however, the lack of a statutory exception referring to "constitutionally required" evidence does not prohibit arguments that evidence of reputation and opinion is admissible in certain circumstances.[85] Although they chose not to change the language of the provision which bars all reputation and opinion evidence, the military drafters recognized the legislative omission and attempted to correct it by offering the following explanation:

> Evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a). It is unclear whether reputation or opinion evidence in this area will rise to a level of constitutional magnitude, and great care should be taken with respect to such evidence.[86]

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[83]E.g., Reputation evidence would be relevant in a rape case where the accused's knowledge of the victim's reputation caused him to act under a reasonable mistake of fact regarding whether the victim consented; Opinion testimony would be relevant if the complainant suffers from psychological or emotional disturbances which are sexual in orientation. Louisell & Mueller, supra note 68, sec. 198[B], at 269.
[84]Fed. R. Evid. 412(b)(1), Appendix A, infra; Mil. R. Evid. 412(b)(1), Appendix B, infra.
[85]Louisell & Mueller, supra note 68, sec. 198[B], at 269.
[86]Analysis, supra note 6. See also Mil. R. Evid. 412(a), Appendix B, infra.

The other key provision common to both rules allows evidence of specific instances of conduct relating to the victim's past sexual behavior[87] to be admitted in certain restricted situations.[88] In addition to admitting specific instance evidence of prior sexual relations with the accused upon the issue of whether the victim consented[89] and evidence of prior sexual behavior with other persons upon the issue of whether the accused was the source of semen or injury,[90] both rules permit the introduction of other past sexual

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[87]Fed. R. Evid. 412(d) and Mil. R. Evid. 412(d) define "past sexual behavior" to include all sexual behavior other than the rape or nonconsensual offense alleged. "This still leaves the difficult question of what behavior is 'other than' that 'with respect to which rape or assault with intent to commit rape is alleged'." Wright & Graham, supra note 4, at 541 n. 26. See United States v. Kasto, 584 F.2d 268 (8th Cir. 1978) cert. denied, 440 U.S. 930 (1979) (forerunner case to Fed. R. 412, where the court held that victim's wearing of uterine contraceptive device at time of rape was "other than" evidence and was properly excluded).

[88]Fed. R. Evid. 412(b), Appendix A, infra; Mil. R. Evid. 412(b), Appendix B, infra.

[89]Fed. R. Evid. 412(b)(2)(B), Appendix A, infra; Mil. R. Evid. 412(b)(2)(B), Appendix B, infra.

[90]Fed. R. Evid. 412(b)(2)(A), Appendix A, infra; Mil. R. Evid. 412(b)(2)(A), Appendix B, infra. In subdivision (b)(2)(A), the absence of a definition of injury is troublesome. "The term 'injury' should be interpreted broadly to include not only bruises, abrasions, lacerations and similar indicatons of physical abuse, but pregnancy, which in the context of the alleged rate is in a real sense an injury ... [I]nterpreting Rule 412 to embrace harm of a non-physical nature would give rise to a real risk of undermining the protections which the Rule is designed to accord." Louisell & Mueller, supra note 75, sec. 198[B], at 267. See also, Berger, supra note 3 at 98 n. 566. But see H.R. 14666 Section (b)(1)(A), Appendix to Hearings, supra note 18. As originally proposed, Fed. R. 412 included "pregnancy" and "disease" but these terms were deleted without explanation.

behavior evidence when "constitutionally required to be admitted."[91]

## IV. Constitutionally Required Evidence

Subdivision (b)(1) of Federal Rule 412 and Military Rule 412 permits the defense to introduce evidence which is "constitutionally required to be admitted."[92] Although this provision was intended to save the rules from a confrontation challenge,[93] at least one commentator notes: "It goes without saying that, even without such a provision, Rule 412 could not take precedence over the Constitution."[94] Notwithstanding, both Congress and the military drafters *cautiously decided to make the "constitutionally required"* provision a part of Federal Rule 412 and Military Rule 412.

Neither Congress nor the military drafters defined the terms "constitutionally required." During the earlier Subcommittee Hearings on a proposed rape shield bill,[95] representatives of the Department of Justice and the American Civil Liberties Union provided examples of hypothetical

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[91]Fed R. Evid. 412(b)(1), Appendix A, infra; Mil. R. Evid. 412(b)(1), Appendix B, infra.

[92]Id.

[93]See text accompanying notes 11 & 49-51 supra.

[94]Saltzburg & Redden, supra note 11, at 224; See also Saltzburg, Schinasi & Schlueter, supra note 11, at 207 (claiming that the provision is unnecessary because any limitation on a constitutional right would be disregarded whether or not the provision existed).

[95]See Hearings, supra note 18.

situations in which they believed exclusion of sexual conduct evidence would violate the accused's constitutional rights.[96] In response, Congress did not decide which examples were valid or make any of the examples specific exceptions to the rule restricting evidence of the victim's unchaste character, but instead chose to avoid the issue by adding the all-encompassing "constitutionally required" exception to Federal Rule 412.[97] The military drafters recognized that evidence of a victim's past sexual behavior may be constitutionally required to be admitted in a number of circumstances; however, they too failed to define the terms "constitutionally required" and provided practitioners with an example of only one circumstance where the evidence

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[96]The following is one of the examples provided by the American Civil Liberties Union during the Hearings:

> A woman is engaged to be married and has had sexual relations with her fiance. One evening, he believes she is acting suspiciously and he questions her as to where she has been earlier that evening and what she was doing. It develops that she has been out with another man with whom intercourse has occurred. The woman alleges that she did not consent but was raped.
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> Defense counsel, in attempting to show the relationship between the complainant and her fiance as a source of potential bias--the theory being that she lied to protect her relationship--will be hampered by H.R. 14666.

Hearings, supra note 18, at 64. See also Saltzburg & Redden, supra note 11, at 227.

[97]See text accompanying note 20 supra.

may be admissible.[98]

When, then, is evidence of a rape or nonconsensual sexual assault victim's sexual history constitutionally required to be admitted? Since the statutory language offers little help, the analysis should proceed with a review of pertinent decisions of the United States Supreme Court. Although the Court has not specifically addressed the confrontation issue concerning rape shield evidence, they have addressed the confrontation clause issue in other contexts when the defendants claim that admission of certain evidence violated their sixth amendment rights.

In Rovario v. United States,[99] the Court concluded that it was prejudicial error to fail to disclose the identity of an informer who was a material witness to the alleged

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[98]Analysis, supra note 6. The military drafters provided the following example:

> If an individual has contracted for the sexual service of a prostitute and subsequent to the performance of the act the prostitute demands increased payment on pain of claiming rape, for example, the past history of that person will likely be constitutionally required to be admitted in a subsequent prosecution in which the defense claims consent to the extent that such history is relevant and otherwise admissible to corroborate the defense position. Absent such peculiar circumstances, however, the past sexual behavior of the alleged victim ... is unlikely to be admissible regardless of the past sexual history. The mere fact that the individual is a prostitute is not normally admissible under Rule 412.

Id.

[99]353 U.S. 53 (1957). Although the basis for the Court's decision is unclear in the opinion, Professor Westen concluded that it was implicitly decided on sixth amendment grounds. P. Westen, Compulsory Process II, 74 Mich. L. Rev. 191, 210 (1975) [hereinafter cited as Westen].

crime, thereby denying the defendant an opportunity to cross-examine the informer or call him as a witness in his own defense.[100]

Using Rovario to draw an analogy between the informer and the rape victim, Professor Peter Westin argues that the rape victim's rights must yield to those of the defendant.[101] On the other hand, Professors Wright and Graham more persuasively argue that the informer and the rape victim are not analogous for several reasons: (1) the informer privilege is clearly designed solely to foster the interests of the state while rape shield statutes foster the victim's interests, (2) the informer privilege denies the defendant any access to the witness, it does not foreclose only a particular line of inquiry, (3) the cases in which the informer privilege has been overridden are most often drug cases or other victimless crimes in which the public interest is arguably less strong than in crimes of violence such as rape, and (4) unlike rape victims, many informers are criminals who are buying immunity from prosecution.[102]

In Chambers v. Mississippi,[103] the Supreme Court reversed the trial court's ruling and held that exclusion of critical defense evidence in a murder trial amounted to a denial of the defendant's confrontation and due process

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[100] Id. at 62.
[101] Westen, supra note 8, at 210.
[102] Wright & Graham, supra note 4, sec. 5387, at 571.
[103] 410 U.S. 284 (1973).

rights.[104] At trial, the defendant wanted to call McDonald to prove that McDonald was the one who committed the murder but Mississippi's "voucher rule" -- that the party calling the witness vouches for the witness' credibility -- prohibited the defendant from cross-examining McDonald as an adverse witness[105] and Mississippi's hearsay rule prevented the defendant from introducing McDonald's hearsay statements to show that he had confessed to the murder on three occasions.[106]

The Court, in Chambers, acknowledged that the right to confrontation is subject to limitation if competing legitimate state interests justify the limitation.[107] In a rape case, the primary competing interest is the victim's right to privacy. The broader competing interest is the state interest in deterring future sexual attacks by securing present convictions. Chambers, however, fails to provide definitive guidance to the courts in determining the constitutionality of rape shield statutes such as Federal Rule 412 and Military Rule 412 on account of the Court's clear statement that its holding is limited to the particular facts of the Chambers case.[108] In Davis v. Alaska,[109] a burglary case, the Supreme Court held that a state law designed

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[104] Id. at 302.
[105] Id. at 295.
[106] Id. at 298.
[107] Id. at 295, citing Mancusi v. Stubbs, 408 U.S. 204 (1972).
[108] Id. at 302-03.
[109] 415 U.S. 308 (1974).

to preserve the confidentiality of juvenile criminal records violated the defendant's right to confront the witness when applied by the trial court to prohibit cross-examination of the principal government witness who was a juvenile.[110] On cross-examination, the defense was precluded from introducing evidence of the juvenile's probation resulting from a juvenile delinquency burglary adjudication to show that his testimony was biased, on the theory that he identified the defendant to the police to divert attention from himself.[111]

As in Chambers, the Court limited their holding in Davis to the specific facts of the case.[112] But, the Davis case does provide some guidance which can be applied to rape cases concerning evidence that may be constitutionally required to be admitted.[113] After establishing that the accuracy and truthfulness of the juvenile's testimony were key elements in the State's case against the defendant,[114] the Court concluded:

> [T]he right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile

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[110] Id. at 318.
[111] Id. at 312-14.
[112] Id. at 315, 321. Mr. Justice Stewart emphasized that "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his delinquency adjudications or criminal convictions." Id. at 321.
[113] Id. at 319-20.
[114] Id. at 317.

> record--if the prosecution insisted on using him to make its case--is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness. 115

Similarly, the victim is the key witness against the accused in rape cases. Applying the Davis rationale to cases in which evidence of the victim's past sexual conduct is offered to show the victim's bias or motive to fabricate the accusation, it follows that the past sexual behavior evidence is "constitutionally required to be admitted." Also, courts[116] and commentators[117] basically agree that the accused has a constitutional right to introduce sexual behavior evidence that shows the victim's bias and motive for fabricating the charge.

Additionally, commentators[118] suggest that sexual history evidence may be constitutionally required in the

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115 Id. at 319.

116 U.S. v. Dorsey, 16 M.J. 1 (C.M.A. 1983); State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976); State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975).

117 Wright & Graham, supra note 4, sec. 5387, at 573-74; Gilligan & Lederer, supra note 13, at 59; Spector & Foster, supra note 25, at 111-12; Rothstein, supra note 13, at 359-62; Tanford & Bocchino, supra note 3, at 582-83; Berger, supra note 3, at 66-68; Rudstein, Rape Shield Laws: Some Constitutional Problems, 18 Wm. & Mary L. Rev. 1, 43 (1976).

118 See generally Wright & Graham, supra note 4, sec. 5387, at 574-90; Gilligan & Lederer, supra note 13, at 59-61; Spector & Foster, supra note 25, at 101-15; Rothstein, supra note 13, at 359-62; Tanford & Bocchino, supra note 3, at 578-89; Berger, supra note 3, at 52-72; Rudstein, supra note 117, at 34-45.

following circumstances: (1) to impeach the victim's credibility by contradiction, (2) to impeach the victim's ability to perceive or recollect the crime, (3) to provide a basis for expert opinion that the complainant fantasized the act, (4) to impeach the victim by proving previous false claims of rape, (5) to impeach the victim by a prior conviction for prostitution, (6) to rebut proof by the prosecution concerning the victim's sexual conduct, (7) to prove that the defendant was under the mistaken belief that the prosecutrix was consenting, and (8) to show a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the encounter to prove consent.

## V. Constitutionally Required Evidence in Federal and Military Cases

### A. Federal Cases

Federal appellate court decisions interpreting Federal Rule 412 since its enactment are sparse -- only six circuit court opinions.[119] But, the federal courts have been somewhat more active in determining whether state rape shield laws violate the accused's right to confrontation in specific

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[119]United States v. One Feather, 702 F.2d 736 (8th Cir. 1983); Doe v. United States, 666 F.2d 43 (4th Cir. 1981); United States v. Lavallie, 666 F.2d 1217 (8th Cir. 1981); United States v. Nez, 661 F.2d 1203 (10th Cir. 1981) United States v. Holy Bear, 624 F.2d 853 (8th Cir. 1980); Government of Virgin Islands v. Scuito, 623 F.2d 869 (3rd Cir. 1980).

circumstances.[120] Bear in mind that the six circuit court opinions interpreting Federal Rule 412, with one exception,[121] do not account for the federal rape cases where the trial judge admitted evidence of the victim's sexual behavior either pursuant or contrary to Federal Rule 412. Consequently, it is difficult to determine with any degree certainty whether Federal Rule 412 is being correctly applied.

In all but one case, Doe v. United States,[122] the circuit courts held that evidence of the victim's sexual

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[120]Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982) (application of Tennessee's rape shield law in which defense was prohibited from cross-examining victim about sexual history to discover evidence of consent did not violate defendant's right to confrontation); Logan v. Marshall, 540 F. Supp. 3 (N.D. Ohio 1981), aff'd, 680 F.2d 1121 (6th Cir. 1981) (application of Ohio's rape shield statute in which defendant was prohibited from questioning victim whether she had venereal disease at the time of the rape did not violate defendant's right to confrontation because he failed to state relevance of evidence at trial); Hughes v. Raines, 641 F.2d 790 (9th Cir. 1981) (no violation of defendant's right to confrontation in Arizona rape case in which defendant was prohibited from questioning prosecutrix regarding a prior rape accusation because circumstances surrounding past accusation and present charge were quite different); Pratt v. Parratt, 615 F.2d 486 (8th Cir. 1980), cert. denied 449 U.S. 852 (1980) (application of Nebraska rape law in which defendant was prohibited from questioning victim about her past sexual conduct was not a confrontation violation because accused's defense was that he was elsewhere at the time of the offense); Cf. Moore v. Duckworth, 687 F.2d 1063 (7th Cir. 1982) (application of Indiana's rape shield law in which jury was prevented from being told that victim was pregnant by her boyfriend did not deny defendant a fair trial since finding that jury was unaware of pregnancy was supported by the record).

[121]Doe v. United States, 666 F.2d 43 (4th Cir. 1981).

[122]Id.

history was properly excluded.[123] In three cases, the circuit courts held the exclusion was proper primarily because of the defendant's failure to lay a proper foundation to show its relevancy.[124] The remaining two cases were not decided pursuant to Federal Rule 412; the policy of

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[123]See note 119 supra. In two oft-cited cases decided prior to the enactment of Fed. R. Evid. 412, the circuit courts upheld the exclusion of evidence of the complainant's sexual conduct against constitutional attack. United States v. Kasto, 584 F.2d 268 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979) (no violation of the defendant's right to confrontation where defendant was prohibited from cross-examining victim concerning any sexual activities she had with other men and from offering any evidence that she was wearing intrauterine contraceptive device at the time of the offense); Rozell v. Estell, 554 F.2d 229 (5th Cir. 1977), cert. denied, 434 U.S. 942 (1978) (no violation of defendant's right to confrontation where defendant was prohibited from cross-examining victim about specific acts of intercourse with others since state interests outweigh the interests supporting the confrontation clause).

[124]United States v. Lavallie, 666 F.2d 1217 (8th Cir. 1981), held that the trial judge did not abuse his discretion in prohibiting defense counsel from asking witness who cohabited with complainant a general narrative question about a babysitting incident in which victim allegedly failed to carry out her responsibilities. Absent an offer of proof, the court was unable to ascertain what answer might have been given to the question.

In United States v. Nez, 661 F.2d 1203 (10th Cir. 1981), the court held that the defendant's attempt to assert for the first time on appeal a theory of motive or bias as the necessary foundation for cross-examining the victim about two previous allegations of rape was improper. The evidence was excluded at trial pursuant to Federal Rule 412(b)(2)(A) and 412(b)(2)(B).

In United States v. Holy Bear, 624 F.2d 853 (8th Cir. 1980), the court found no error or abuse of discretion based upon trial judge's instruction to counsel not to inquire into past sexual conduct of prosecutrix without laying foundation and making offer of proof. The defense counsel did not object to the instruction at trial.

Rule 412 was merely considered in reaching the decisions.[125]

The Doe case is unique in several respects. The victim in Doe appealed the pretrial Federal Rule 412 evidentiary ruling of the trial judge which permitted the defense to introduce substantial evidence concerning her past sexual

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[125]United States v. One Feather, 702 F.2d 736 (8th Cir. 1983), held that the trial judge did not abuse his discretion in prohibiting defense counsel from asking the victim a question about her marital status which would bring to jury's attention that she had an illegitimate child. The district court concluded that the question indirectly elicited sexual behavior evidence, contrary to the policy of Fed. R. 412, however, excluded the evidence under Fed. R. 403. The circuit court noted that the policy of Fed. R. 412 may be taken into account in determining the amount of unfair prejudice under Fed. R. 403.

In Government of Virgin Islands v. Scuito, 623 F.2d 869 (3rd Cir. 1980), the court held that the district court did not abuse its discretion in denying defendant's motion for a psychiatric examination of the complainant on the ground that ordering such an examination would violate the spirit of Fed. R. 412.

Cf. United States v. Bear Ribs, 722 F.2d 420 (8th Cir. 1983) (although no mention of Fed. R. 412 in opinion, no abuse of discretion where judge refused to admit evidence of victim's habit of publicly exposing herself where accused denied seeing the victim on the night in question).

behavior and habits.[126] The Fourth Circuit Court of Appeals broke new ground and held that the victim has an implied private right of action under Federal Rule 412 to appeal the pretrial decision of the trial judge.[127]

The circuit court reversed the trial judge's order in part, holding that various items of evidence concerning the victim's alleged habits were essentially opinion or reputation evidence and not admissible.[128] The court also affirmed the trial judge's ruling in part, allowing evidence of telephone conversations between the defendant and the

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[126]The district court ruled that the following evidence was admissible:

> (1) evidence of the victim's 'general reputation in and around the Army post ... where Mr. Black [defendant] resided;' (2) evidence of the victim's 'habit of calling out to the barracks to speak to various and sundry soldiers;' (3) evidence of the victim's 'habit of coming to the post to meet people and of her habit of being at the barracks at the snack bar;' (4) evidence from the victim's former landlord regarding 'his experience with her' alleged promiscuous behavior; (5) evidence of what a social worker learned of the victim; (6) telephone conversations that Black had with the victim; (7) evidence of the defendant's 'state of mind as a result of what he knew of her reputation ... and what she had said to him.'

666 F.2d 43, 47 (4th Cir. 1981).

[127]Id. at 46. The court noted that the policy embodied in Federal Rule 412 would be frustrated if rape victims were not allowed to appeal erroneous rulings made at the pretrial hearings. "Without the right to immediate appeal, victims aggrieved by the court's order will have no opportunity to protect their privacy from invasions forbidden by the rule. Appeal following the defendant's acquittal or conviction is no remedy, for the harm that the rule seeks to prevent already will have occurred." Id.

[128]Id. at 47-48. Specifically, the evidence items 1-5 were found within the proscription of subdivision(a) of the rule. See text accompanying note 126 supra.

victim before the alleged crime and evidence of the defendant's knowledge, acquired before the alleged crime, of the victim's reputation which was relevant on the issue of the defendant's intent.[129] The defendant argued that the proffered sexual conduct evidence[130] was "constitutionally required," pursuant to Federal Rule 412(b)(1), to support his claim that the victim consented, to show the reasonableness of his belief that she consented and to corroborate his testimony.[131]

In finding that the first five evidence items[132] were precluded by Federal Rule 412(a), the court provided the following constitutional justification for excluding reputation and opinion evidence: (1) an accused is not constitutionally entitled to present irrelevant evidence and (2) reputation and opinion evidence are not relevant indicators of consent or veracity.[133] Next, the court affirmed the allowance of evidence of telephone conversations between the accused and the victim by properly concluding that the evidence

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[129] Id. at 48. The court found evidence described in items 6 and 7 admissible. See text accompanying note 126 supra.
[130] See text accompanying note 126 supra.
[131] 666 F.2d 43, 47 (4th Cir. 1981).
[132] See note 126 and accompanying text supra.
[133] 666 F.2d 43, 47-48 (4th Cir. 1981). The court acknowledged that Fed. R. Evid. 412(a) is not an absolute bar on reputation or opinion evidence regarding evidence of past sexual conduct, however, they found that no extraordinary circumstances were present for deeming that the rule's exclusion of the reputation and opinion evidence contained in evidence items 1-5 is unconstitutional. Id.

was not within the proscription of Federal Rule 412.[134]

After side-stepping the required constitutional analysis and applying a general test of relevancy, the court erroneously affirmed allowance of testimony from third parties to show the defendant's knowledge, acquired prior to the alleged offense, of the victim's past sexual activities. The following excerpts from the opinion illustrate the court's circumvention of the provisions of Federal Rule 412:

> [T]he rule does not exclude the production of the victim's letter[135] or testimony of the men with whom Black talked if this evidence is introduced to corroborate the existence of the conversations and the letter. ... There is no indication, ... that this evidence is to be excluded when offered solely to show the accused's state of mind. Therefore, its admission is governed by the Rules

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[134]The terms "past sexual behavior" are not adequately defined in Federal Rule 412(d) and are subject to wide interpretation by the courts. See note 87 supra. It was not unreasonable for the court to decide that the telephone conversations did not constitute "past sexual behavior" within the meaning of 412(d). Assuming arguendo that the telephone conversations do constitute "past sexual behavior," the evidence would be admissible under 412(b)(2)(B) as evidence of past behavior with the accused on the issue of consent.

[135]At the evidentiary hearing, Black testified that he had read a love letter the victim had written to another man. 666 F.2d 43, 47 (4th Cir. 1981). The contents of the letter are not revealed in the opinion. The letter, like evidence of the telephone conversations, does not fall within the purview of 412(d). See note 134 and accompanying text supra. Therefore, its admissibility is governed by Federal Rule 403.

of Evidence dealing with relevancy in general.[136] It is unclear from the opinion whether the testimony of the men with whom Black talked is reputation or opinion testimony or whether it is testimony of specific instances of sexual behavior.[137]

If the testimony of the men is of specific instances of sexual conduct, the court ignored the clear mandate of Federal Rule 412(b) by failing to determine whether the evidence was constitutionally required to be admitted. Absent an allegation by the accused that the sexual conduct evidence shows someone other than the accused was the source of semen or injury or that the evidence shows prior sexual activity with the accused to infer consent, the "constitutionally required" provision presents the sole means to determine the admissibility of sexual behavior evidence. Adding insult to injury, the court created an evidentiary exception outside the rule and applied a general relevancy standard to determine admissibility of the evidence.

If the mens' testimony is in the form of reputation or opinion, it is inadmissible under Federal Rule 412(a). In reaching the decision to admit the mens' testimony concerning

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[136]666 F.2d 43, 48 (4th Cir. 1981).

[137]The only indication of the nature of the testimony of the men appears during the court's brief recitation of the defendant's testimony during the evidentiary hearing: "Several men previously had told him the victim was promiscuous." Id. at 47.

the victim's promiscuity, the court refers first to the legislative history of Federal Rule 412 and reiterates that reputation and opinion evidence are not relevant to the issue of the victim's consent.[138] Then, the court attempts to distinguish the instant case by concluding that the evidence offered by the defendant bears on a different issue not covered by Federal Rule 412, the accused's state of mind.[139] The court's analysis misses the main point. Although the court is correct in asserting that the testimony is being offered by the accused to show he knew, prior to the alleged offense, of the victim's reputation, the court stops short of completing the analysis by failing to conclude that the reputation testimony, which bears upon the accused's state of mind, is being offered by the accused to show that he believed the victim "consented" to the intercourse. Accordingly, the reputation testimony of the men offered to show the victim's consent is irrelevant evidence proscribed by Federal Rule 412. Despite the court's earlier recognition that there are sometimes extraordinary circumstances when reputation evidence will be constitutionally required,[140] the court did not consider that possibility with respect to the mens' testimony and chose to forego constitutional analysis.

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[138] Id. at 48. Earlier in excluding evidence items 1-5, the court concluded that reputation and opinion are not relevant indicators of the victim's consent. See supra pages 38-39.
[139] 666 F.2d 43, 48 (4th Cir. 1981).
[140] See page 39 & note 133 supra.

The net result of the Fourth Circuit's decision to admit the testimony of several men who told the defendant that the victim was promiscuous is to put the victim in exactly the same position she was in before she initiated the appeal.[141] The court's misinterpretation of the Federal Rule 412 in Doe "threatens to turn back the clock to the time of Sir Matthew Hale and vitiate the utility of rule 412 as a means of implementing the federal legislative purposes motivating its enactment." [142]

B. Military Cases

The United States Court of Military Appeals first addressed the meaning of the "constitutionally required" provision in a trilogy of cases decided in July 1983.[143] Prior to the interpretation of Military Rule 412 by the Military Court of Appeals, there appeared to be no standard

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[141]Thus, the court's erroneous ruling enables the defendant to bring before the jury reputation and opinion evidence that the court previously determined was inadmissible evidence (items 1-5). See note 126 supra.

[142]Spector & Foster, supra note 25, at 97.

[143]United States v. Dorsey, 16 M.J. 1 (C.M.A. 1983); United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983).

developed by the various military courts of review. [144]

In United States v. Dorsey,[145] the court developed a test to determine whether excluded evidence of the rape victim's prior sexual intercourse with the accused's roommate was "constitutionally required" to be admitted. The defense theory of the case was that the prosecutrix fabricated the charge of rape after the accused rejected her advances and rebuked her for alleged marital infidelity for having engaged in sexual intercourse a few hours before with the

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[144] E.g., United States v. Garcia, 15 M.J. 685 (A.F.C.M.R. 1983), found no abuse of discretion where the military judge precluded the accused from questioning the unmarried victim in a rape and burglary case concerning her pregnancy at the time of the offense. The defense offered the evidence based upon a motive theory that rape allegation provided the victim with a convenient excuse to explain the pregnancy to her relatives. The court applied Mil. R. Evid. 412(c)(3) and determined that the evidence was of doubtful probative value considering the accused's admission that he had broken into her apartment and had sexual intercourse with her while she struggled. In United States v. Ferguson, 14 M.J. 840 (A.C.M.R. 1982), the court set aside findings of guilty based upon the trial court's failure to admit "constitutionally required" evidence. Applying Mil. R. 412 (b)(1), the court held that the accused, a black soldier, was entitled to cross examine the prosecutrix, a white woman, to show that she falsely accused him of rape and sodomy. The defense theory was that the victim was seeking an act of revenge stemming from a prior abortion followed by rejection by her lover who was black. The court held that evidence which is more than marginally relevant to determining bias or motive to fabricate is constitutionally required and must be admitted under Mil. R. 412(b)(1).

[145] 16 M.J. 1 (C.M.A. 1983).

accused's roommate.[146] The trial judge excluded introduction of any extrinsic concerning the act of intercourse between the accused's roommate and the victim; however, the trial court permitted the accused to testify about the chain of events during the entire evening.

Focusing on the confrontation and compulsory process clauses of the sixth amendment, the court held that the "constitutionally required" exception to Military Rule of Evidence 412 is based upon the accused's sixth amendment right to present a defense.[147] Based on these principles

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[146]The victim, a servicemember, testified at trial that the accused, Dorsey, came to her dormitory room two times on the night in question looking for his roommate because Dorsey had locked himself out of his room. The accused's roommate, Murphy, was in the victim's room but he left with Dorsey after the second visit. Dorsey returned the third time alone and invited the victim to visit him and Murphy in their common lounge area. She agreed in order to prevent him from coming back to her room. Dorsey was waiting for her when she left her room and he escorted her to his room. Once inside, he prevented her from leaving and forcibly raped her. The accused, an Army private, testified that on the third visit to her room he invited her to his room but did not think she would come. After she came to his room, they sat on the bed and talked. Then, the victim stood up and stripped to her slip. He did not want to have sex with her and called her a married "whore" because she just had sexual relations with his roommate and now wanted to have sex with him. She began to cry and ran from his room. Id. at 2-3.

[147]Id. at 5.

and a Supreme Court compulsory process case,[148] the court concluded that evidence is "constitutionally required" if it is relevant, material and favorable to the defense.[149]

In determining whether evidence is relevant, the court adopted the relevancy standard in Military Rule of Evidence 401.[150] Second, in determining whether evidence is material, "it is necessary to consider the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of other evidence in the case pertaining to this issue."[151] The court did not further define the third prong of the test; however, in applying the third prong of the test to the facts in Dorsey, the court considered the following evidence to be favorable to the accused: any exculpatory evidence, any evidence which corroborated the accused's testimony and any evidence which undermined the credibility of the sole prosecution

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148Judge Fletcher, writing the opinion in Dorsey, refers to United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (compulsory process case where Supreme Court state that an accused has the right to present evidence which is relevant, material and favorable to his defense), Davis v. Alaska, 415 U.S. 308 (1974), and Westen, Compulsory Process II, 74 Mich. L. Rev. 191 (1975) in developing the test for "constitutionally" required evidence. 16 M.J. 1, 4-7 (C.M.A. 1983).

149Id. at 5-7.

150Id. at 5. Mil. R. Evid. 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

15116 M.J. 1, 6 (C.M.A. 1983).

witness.[152] Also, the court assumed that the balancing standard in subdivision (c)(3) of Military Rule 412 was applicable to determine whether evidence is constitutionally required to be admitted.[153]

Applying the three-part test to Dorsey, the court found that the excluded evidence was relevant, because it attempted to show the victim's feelings of guilt and a motive for the victim to cry rape; material, because it pertained to the critical and disputed issue of the victim's credibility where no other evidence was available to show her feelings of guilt; and favorable to the defense because it was exculpatory to the extent that it undermined the credibility of the sole prosecution witness and it could have corroborated the accused's testimony.[154] Finally, in applying the balancing standard in Military Rule 412(c)(3), the court decided that once the accused demonstrated the evidence was relevant, material and favorable to his defense, it followed that his constitutional right to present the evidence was paramount.[155]

There are several problems with the court's analysis. First, in applying the first test of relevancy, the court

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[152] Id. at 7.

[153] Id. at 7. The court noted that the balancing test prescribed in Mil. R. Evid. 412(c)(3) may not be appropriate for evidence admitted in accordance with subdivision(b)(1); however, the court "assumed" that it was appropropriate and applied it in Dorsey. See supra note 68 and accompanying text.

[154] Id. at 5-7.

[155] 16 M.J. 1, 8 (C.M.A. 1983).

lowered the threshold of admissibility to a test of relevancy based upon speculation and conjecture, thereby conflicting with the policy favoring exclusion which underlies Military Rule 412. The court determined that the evidence in Dorsey had some tendency to show the existence of a guilty state of mind; however, the finding of relevancy was based upon conjecture and inferences.[156] In his vigorous dissent, Judge Cook rightly criticized the majority's determination of relevancy and proclaimed that defendants in future cases need only utter three things to side-step the proscriptions of Military Rule 412 and guarantee relevancy: deny that the crime occurred, assert that he insulted the victim regarding her sexual behavior and articulate a belief that the victim's complaint was false based upon her desire

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[156]We conclude such evidence was relevant to her feelings of guilt. From it the inference can be drawn that the prosecutrix had knowledge that appellant's accusations were true or at least had some basis in fact. In our opinion, it would not be unreasonable to further infer that a person brutally confronted with the harsh realities of her conduct might feel some guilt. Accordingly, ....

Id. at 6. Judge Cook, in his dissent, expresses his opinion on the relevancy of the evidence:

> My problem in this case is that the theory of relevance accepted by the majority requires speculation upon speculation upon speculation--speculation that [victim] would be hurt by the insult; speculation that she would then seek to retaliate against appellant; and speculation that the method she would choose would be a false accusation of rape.

Id. at 12-13.

to retaliate against the insult.[157]

Second, the materiality standards are such that the first two considerations for determining materiality favor admissibility and will be present in the majority of rape cases. The rape victim is usually the only eyewitness to the rape, making her credibility a central issue in the case and the issue which is most vigorously disputed. Judge Cook noted some key factors which the majority failed to weigh properly including the very substantial case the prosecution presented against the defendant, the accused's "now I wanted it, now I didn't" account of the incident, the testimony of the accused's commander which described him as a liar and described the victim as honest and truthful, the hysteria which the victim exhibited when she returned to her room and the improbability that someone as promiscuous as the victim would become so enraged by a mere insult as to fabricate the charge.[158]

One final aspect of the court's analysis deserves attention. Although the court stated the balancing test prescribed in Military Rule 412(c)(3) was applicable to "constitutionally required" evidence, the court gave it superficial treatment in Dorsey. The court did nothing more than conclude that the evidence was admissible under

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[157] Id. at 12. Judge Cook recognized that once this was done, "an accused will be as free as ever an accused was to intimidate and degrade an alleged victim regarding her sex life." Id.

[158] Id. at 10-11.

subdivision (c)(3) because it met the three-tier test of being relevant, material and favorable to the defense.[159] Thus, it is unclear whether the balancing test of Military Rule 412(c)(3) remains as a fourth level of analysis or whether it was superceded by the the three-step test.

In United States v. Elvine,[160] the three judges unanimously held that evidence of a rape victim's reputation for promiscuity and evidence of acts of sexual intercourse with others before and after the alleged rape was properly excluded.[161] The distinction between Elvine and Dorsey is that the accused in Elvine failed to demonstrate any nexus between the prior acts and the charged offense and he failed to provide the judge with a theory of "why it was reasonable that an unmarried woman, such as the prosecutrix, who purportedly had a habit of indiscriminately engaging in sex, would probably falsely accuse the appellant of rape."[162] In his concurring opinion, Chief Judge Everett opined that some of the excluded evidence might have been constitutionally required to be admitted if it had been offered at trial for the express purpose of demonstrating a mistaken belief that the prosecutrix had given her consent.[163] In holding that the reputation evidence was properly excluded because it was not material, the court indicated that Military Rule 412(a) should not

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[159] 16 M.J. 1, 8 (C.M.A. 1983).
[160] 16 M.J. 14 (C.M.A. 1983).
[161] Id. at 19.
[162] Id. at 16.
[163] Id. at 19.

be construed as an absolute bar to evidence of a victim's reputation and suggested the three-step test for constitutionally required" evidence as a means for determining admissibility.[164]

In United States v. Colon-Angueira,[165] the court held that evidence of the victim's sexual conduct after the alleged rape was "constitutionally required" but admission of the evidence did not require reversal because the accused was not prejudiced by the exclusion.[166] The defense counsel proffered the evidence on the theory that the victim engaged in sexual intercourse with the accused and with others after the alleged rape in retaliation for her husband's supposed cheating on her with another woman.[167]

Applying the three-step test developed in Dorsey, the court determined the excluded was relevent, material and favorable to the accused's case. Judge Fletcher, writing for the majority, found the excluded was relevant because it tended to show the existence of emotions in the prosecutrix toward her husband before and after the alleged offense

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[164] Id. at 18.
[165] 16 M.J. 20 (C.M.A. 1983).
[166] Id. at 26-27.
[167] Id. at 23-24. The defense was permitted to call Mrs. Robinson who worked with the prosecutrix as a cab driver. She testified that the victim admitted prior to the alleged rape that the she had discovered her husband had been unfaithful to her and was very upset and angry. Id. at 23.

which may have caused her to consent.[168] The court found that the evidence was material, because, as in Dorsey, it pertained to the crucial contested issues of the victim's credibility and consent; and favorable to the accused's case, because it would have added "some slight weight and substance to the ... defense evidence of motive already admitted in this case."[169]

The court's reasoning in Colon-Angueira is nearly identical to its rationale in Dorsey, except that the court stretched the threshold requirements for relevancy to even greater limits in Colon-Angueira. The majority in Colon-Angueira determined the evidence might support an inference that the victim's acts of intercourse were in retaliation against her husband; however, the court failed to explain why an accused who thought he was engaging in consensual sexual intercourse would use a knife to cut the victim's bra straps and select the bushes as the place

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[168] Id. at 24-26. No evidence was presented to connect the temporal proximity between the victim's emotional state before the alleged rape and her emotional state during her acts of intercourse with others subsequent to the alleged offense except for defense counsel's averment that it was a four month period. Notwithstanding, the court found "a four-month period does not per se mean that the subsequent emotional state was not relevant to the prosecutrix' emotion at the time of the offense." Id. at 26.

[169] Id. at 27.

for their sexual activity.[170] One commentator labeled the imaginative theory of admissibility proffered by the defendant in Colon-Angueira a "forensic fable."[171] Judge Cook's dissent best illustrates the problems in the majority's interpretation of the "constitutionally required" provision:

> [T]he majority arrives at the conclusion that admission of evidence that the prosecutrix later had consensual intercourse with her co-workers could theoretically have tended to prove that the intercourse with appellant was also consensual. I consider this utter nonsense, for given sufficient time and imagination, and absent any restrictions on length or probability, I am confident that a sequence of inferences can be fashioned such that virtually any fact, theoretically, could be said to support any other. But the judicial process cannot function with such a theory of

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[170]During the trial, the accused took the stand and admitted to having sexual intercourse with the prosecutrix but asserted that she was willing and responsive. He admitted that he had a knife and that he used it unnecessarily to cut her bra straps and to cut branches as they moved through the bushes. The victim testified that the accused, a customer in her taxicab, pulled a knife and ordered her to drive to a secluded spot where he ordered her out of the cab. After removing her shirt, he cut her bra straps, ordered her to remove the remainder of her clothing and forciby raped her. Id. at 22-23.

[171]See Wright & Graham, supra note 4, sec. 5387, at 81 (Supp. 1985).

relevance.[172]

In Dorsey, Elvine and Colon-Angueira, the Court of Military Appeals has accomplished what the Doe[173] court failed to do by defining a framework for analysis to determine when evidence is constitutionally required to be admitted. Additionally, the three decisions make it clear that any type of evidence may be constitutionally required to be admitted despite the absolute bar on reputation and opinion evidence in Military Rule 412(a).[174] But, in attempting to give definition to the "constitutionally required" provision of Military Rule 412, the court has in effect replaced Military Rule of Evidence 412 with the three-part test developed in Dorsey which centers on relevancy, materiality and favorability to the defense.

Since Dorsey, Elvine and Colon-Angueira, the court has decided three cases[175] which raised issues concerning Military Rule 412. The only attempt to explicate the troublesome rationale of the earlier cases appears in United States v.Hollimon.[176] After a reiteration by the court that the same three-part analysis applies to all types

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[172]Id. at 31.
[173]666 F.2d 43 (4th Cir. 1981).
[174]United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983); United States v. Elvine, 16 M.J. 14, 18 (C.M.A. 1983); United States v. Colon-Angueira, 16 M.J. 20, 24 (C.M.A. 1983). Cf. page 24-25 supra.
[175]United States v. Carr, 18 M.J. 297 (C.M.A. 1984); United States v. Pickens, 17 M.J. 391 (1984); United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983).
[176]16 M.J. 164 (C.M.A. 1983).

of sexual conduct evidence, the court briefly noted: "While the members of our Court have sometimes differed as to the probative quality or weight of particular evidence, we have started from the same premise. Moreover, that premise probably would apply even in the absence of Military Rule of Evidence 412."[177]

In Hollimon,[178] decided shortly after the Dorsey trilogy, the court upheld the trial court's exclusion of evidence of the victim's prior instances of sexual behavior and evidence of the victim's reputation.[179] The court applied the three-part test to both the evidence of specific acts and the reputation evidence. The reputation evidence was not relevant because it fell short of establishing the defense theory that it was the habit of the victim to consent to sex freely and indiscriminately, thus showing that her conduct was in conformity on the occasion in question.[180] However, the court suggested that the defense rationale may be correct, leaving the question open for future interpretation.[181] The court held that testimony concerning the victim's prior sexual activities was not relevant because there was no indication that the accused's

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[177] Id. This is yet another indication that the court considers Mil. R. Evid. 412 to be a rule of relevance only.
[178] Id.
[179] Id. at 167.
[180] Id. at 166.
[181] Id. The court opined that reputation might be relevant in a prosecution for assault with intent to rape where the victim's reputation, if known to the accused, might tend to negate the specific intent.

encounter with the victim was under circumstances similar to the victim's prior sexual encounters.[182] The two more recent decisions, United States v. Pickens,[183] and United States v. Carr[184] provide no additional assistance on understanding the court's interpretation of Military Rule 412.

Based upon the Court of Military Appeals' interpretation of Military Rule 412, the following types of sexual behavior evidence are constitutionally required to be admitted: (1) evidence offered to show the victim's bias or motive to make a false accusation, (2) evidence offered to show the victim's motive to consent, (3) evidence of a repeated, specific pattern of behavior to show consent, (4) evidence of the accused's state of mind to show mistaken belief in the victim's consent and (5) evidence of the accused's state of mind to negate the element of specific intent in cases of attempted rape or assault with intent to commit rape. Of course, the interpretation of Military Rule 412 is subject to change since only one of the three judges

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[182] Id. at 166.

[183] 17 M.J. 391 (C.M.A. 1984). Evidence of specific instances of the victim's past sexual behavior was properly excluded because it was not similar in circumstance to either the victim's or the accused's version of events which led to the charge; thus, it was not relevant to prove consent or to undermine the victim's credibility.

[184] 18 M.J. 297 (C.M.A. 1984). In Carr, the court opined that the testimony of the accused's friend who allegedly told the accused that the rape victim wanted male companionship might have been relevant and admissible because it was closely related to consent and might have tended to support a claim of mistake of fact. However, the witness was not called by the defense.

who decided Dorsey, Elvine and Colon-Angueira presently presides on the court.[185]

## VI. Conclusion

Federal Rule 412 and Military Rule 412 were enacted in response to a changing moral climate and a move for the equality of women which made us aware of the abuses suffered by rape victims in the criminal justice system. Facially, the rules provide protection during trial for victims, most of whom are likely to be women, of rape and nonconsensual sexual offenses. Both Congress and the military drafters specifically intended to change the common law tradition of allowing evidence of a victim's sexual activities at trial which not only degraded and embarrassed the victim but also clouded the real issues in the case. In doing so, they hoped that the rules would also encourage victims to report rapes and nonconsenual sexual offenses and encourage victims to cooperate in prosecuting the offender. Thus, their intentions were noble.

Underneath the surfaces, however, both rules create substantial interpretational problems. Failure to define adequately the meaning of "past sexual behavior," "injury" and the "notwithstanding" clauses are just a few examples

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185Judge William Cook retired on 31 March 1984. He was replaced by Judge Walter T. Cox III on 6 September 1984. Judge Albert Fletcher retired on 11 September 1985. A replacement for Judge Fletcher has yet to be named. Robinson O. Everett is the presiding Chief Judge.

of poor drafting which allows for varied interpretation and potential undermining of the rules' purposes. The procedural requirements of Military Rule 412 weaken the true intent of the rule "to limit victim embarrassment and harassment" by replacing the fifteen day notice requirement with virtually a no-notice requirement, by allowing the evidentiary hearing to be conducted with spectators present and by leaving open the possibility that the rule is not applicable during the Article 32 preliminary hearings. On the other hand, Federal Rule 412 unjustifiably limits the application of its provisions to rape and attempted rape victims, thereby excluding victims of other nonconsensual sexual offenses who deserve equal attention.

Unequivocally the greatest problem inherent to both rules is the interpretation of the "constitutionally required" provision. Although it was added to the rules to insure that Federal Rule 412 and Military Rule 412 did not protect the victim at the expense of the defendant's constitutional rights, it was unnecessary because the provisions of Federal Rule 412 and Military Rule 412 cannot supersede the Constitution. The "constitutionally required" provision has created uncertainty, confusion and a lack of consensus in federal and military courts. Certainly, the rights of the accused always warrant protection and protection in rape cases should be no exception. By neither delineating specifically what evidence is "constitutionally required

to be admitted" nor establishing a framework for analysis, Congress and the military drafters have given broad discretion to federal and military courts. This is, of course, in light of no definitive ruling from the Supreme Court regarding the admissibility of sexual history evidence.

At first blush, it seems to appear that Federal Rule 412 and Military Rule 412 are serving their purpose-- protecting the privacy of the victim by excluding irrelevant sexual behavior evidence. However, cases such as Doe, Dorsey and Colon-Angueira expose an underlying rationale which may eventually lead to the demise of the rules. It is evident from analyzing Doe that the court did not consider itself bound by the provisions of Federal Rule 412 as it ignored the requirement to conduct necessary constitutional analysis and declared the rule inapplicable when evidence is offered to show lack of intent. Although the Military Court of Appeals has conscientiously developed a framework for analysis of sexual behavior evidence, the court has transformed Military Rule 412 into a low threshold rule of relevancy which tends to favor admissibility of sexual conduct evidence if the accused is able to articulate a convincing theory of admissibility based upon conjecture and s lation. Judge Cook recognized that once this was done, "an accused will be free as ever an accused was to intimidate and degrade an alleged victim regarding her

sex life."[186]

Because the cases available for analysis do not represent the occasions when Federal Rule 412[187] and Military Rule 412 were applied by the trial court and the evidence of the victim's sexual history was admitted, it is impossible to assess accurately whether the rules are serving their purpose. But, it is possible to make an assessment based upon the existing federal and military courts' interpretations of Federal Rule of Evidence 412 and Military Rule of Evidence 412: Victims of rape or nonconsensual sexual offenses do not have any more assurance today than they had before the enactment of Federal Rule 412 and Military Rule 412 that their private sexual behavior will not unnecessarily be made public at trial.

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[186] See note 157 supra.
[187] Doe v. United States, 666 F.2d 43 (8th Cir. 1981) is the only exception.

# APPENDIX A

Federal Rule of Evidence 412. Rape cases: Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is -

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of --

(A) past sexual behavior with persons other

than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c) (1) If the person accused of committing rape or assault with intent to rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later that fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall

be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

## APPENDIX B

Military Rule of Evidence 412. Nonconsensual Sexual Offenses; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsenual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

(b) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is --

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source

of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(c) (1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.

(2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which maybe closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to Article 39(a).

(3) If the military judge determines on the basis of the hearing described in paragraph (2) that

the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, indecent assault, and attempts to commit such offenses.

## Table of Cases

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